



Sac & Fox Tribe of the Mississippi in Iowa

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"MESKWAKI NATION"

August 23, 2006

Philip N. Hogen, Chairman
Attn: Penny Coleman, Acting General Counsel
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

VIA FACSIMILE (202) 632-0045

Re: Comments on Class II Classification Standards and Electromechanical Facsimile Definitions

Dear Chairman Hogen and Vice-Chairman Chóney:

I am in receipt of the Commission's Proposed Rule Changes, dated May 25, 2006, requesting comments on the Class II Gaming Classification Standards and Definition for Electronic or Electromechanical Facsimile. On behalf of the Sac & Fox Tribe of the Mississippi in Iowa (the "Tribe") (also known as the Meskwaki Nation), I submit the following written comments.

THE TRIBE AND ITS GAMING FACILITY

The Tribe is a sovereign, federally recognized Indian nation. It exercises sovereign governmental authority over persons and activities on the Tribe's lands, known as the Meskwaki Settlement. The Settlement is located in Tama County, Iowa, and has been recognized as Indian land (as defined by applicable federal law) for over 80 years.

Pursuant to the Tribe's Gaming Ordinance, Title 11, adopted by the Tribe on December 10, 1992, and approved by the Department of the Interior, 67 Fed. Reg. 165 (Aug, 26, 2002), the Tribe operates the Meskwaki Bingo Casino Hotel (the "Casino"), at which the Tribe has conducted class II gaming (as defined by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* ("the IGRA")), since 1995. Pursuant to the Compact Between the Sovereign Indian Nation of the Sac and Fox Tribe of the Mississippi in Iowa and the Sovereign State of Iowa to Govern class III Gaming on Indian Lands of the Sac and Fox Tribe of the Mississippi in Iowa (the "Compact"), entered into by the parties on March 21, 1995, and approved by the Department of the Interior on June 5, 1995, the Tribe has conducted class III gaming (as defined by the IGRA), at the same facility since 1995. After lengthy negotiations between the Tribe and the State, on October 21, 2004, approved by the Department of the Interior on December 20, 2004, the Compact was renewed for a fifteen year term. In accordance with the IGRA's mandate, and

in compliance with the requirements of the Tribe's Gaming Ordinance, and consistent with the terms of the Compact, the Tribe has licensed and regulated the Casino in an exercise of its sovereign right to engage in gaming to raise revenues for essential governmental functions.

THE PROPOSED AMENDMENTS VIOLATE COMMON LAW.

In recent years, the Department of Justice ("DOJ") has persistently sought to label class II games employing technologic aids as "gambling devices" subject to criminal enforcement under the Johnson Act, or alternatively, as class III devices requiring a state-tribal compact. See U.S. v. 103 Elect. Gambling Devices, 223 F. 3d 1091 (9th Cir. 2000); U.S. v. 162 Mega-Mania Gambling Devices, 231 F. 3d 713 (10th Cir. 2000); Diamond Game Enterprises v. Reno, 230 F. 3d 365 (D.C. Cir. 2000); U.S. v. Santee Sioux Tribe of Neb., 324 F. 3d 607 (8th Cir. 2003), *cert. denied*, 540 U.S. 1229 (2004); Seneca-Cayuga Tribe of Okla. v. National Indian Gaming Comm'n, 327 F. 3d 1019 (10th Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004). The courts have consistently rejected all such attempts since 2000. See *id.* In fact, the United States Supreme Court refused in 2004 to accept review of two cases from the Eight and Tenth U.S. Circuit Courts of Appeal. This refusal left court rulings intact that the gaming devices at issue were class II, not class III games.

The IGRA authorizes the use of "electronic, computer or other technological aids" for class II gaming when the fundamental characteristics of the game remain intact. See Seneca-Cayuga; Santee Sioux; Diamond Game Enterprises; 103 Elect. Gambling Devices; 162 Mega-Mania; Cabazon Band of Mission Indians v. NIGC, 827 F. Supp. 26 (D.D.C. 1993). The proposed amendments essentially would throw out the window the previously settled class II regulatory regime of NIGC advisory opinions and court determinations. The NIGC and DOJ seek to do with the proposed regulations what it could not do in court. It is a revolutionary change and forebodes a new federal termination policy should the proposed amendments become law.

THE PROPOSED AMENDMENTS VIOLATE THE IGRA.

The proposed regulations under 25 CFR § 546.4, providing for detailed descriptions of 'cards' and 'prizes,' are structural elements of bingo, far too specific and invasive to be within the jurisdiction of the IGRA. The intent of Congress in enacting the IGRA was "to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4) (1988). There is evidence of this intent in §2702(1),(2), and (3), where the purpose of the IGRA is aimed at the above-mentioned goals, as well as protecting tribes from organized crime, ensuring that tribes are the primary beneficiary of their gaming operations, and that games are conducted fairly and honestly by both the operator and the players, and to ensure that gaming is used to generate tribal revenue. Further evidence is found in § 2710(2)(A-F), where the Chairman of NIGC is to approve tribal ordinances when they ensure the Tribe is the sole proprietary interest, that net revenues are used for tribal government and the general welfare of the tribe, that contracting related to gaming are subject to audits, that the gaming facility protects the environment, public health and safety and threat there is an adequate system to look into the management and key employees of the gaming facility. There is no indication, however, from the regulatory duties delegated to the NIGC at the time the IGRA was enacted, nor is there

evidence from the statute, that the IGRA or the NIGC was intended to define and certify bingo and class II gaming.

THE NIGC HAS FAILED TO ENGAGE IN GOVERNMENT-TO-GOVERNMENT NEGOTIATION.

Tribes have the greatest interest in properly regulating their gaming facilities, as it is their sovereignty, government operations, and financial stability at issue. Tribes are ultimately responsible for the regulation of class I and class II gaming, even where the NIGC helps govern. *See* 25 U.S.C. § 2701(5) (“tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”) The practical implications of the proposed changes impose detailed regulations on class II gaming, making compliance and oversight burdensome, inefficient, and, most significantly, fundamentally alter the legal landscape and statutory structure of the IGRA.

Despite the formation of a tribal advisory committee to provide comments on previous drafts of the classification rules, the NIGC for the most part did not incorporate tribal input. The NIGC found the tribal consultation process to be problematic, noting that there were many times during the development of the proposed regulations that the tribal committee representatives strongly disagreed with decisions made by the Commission. Common sense suggests that consultation and deliberation would involve disagreement. It is only through proper negotiation and respect for the status of tribes as sovereign nations that the best interests and longevity of tribes are properly represented. The fact that the NIGC engaged in negotiations with the DOJ regarding the class III classification standards is a fundamental breach of the IGRA.

THE PROPOSED RULES FAIL IN THEIR PURPOSE.

The four elements proposed to redefine class II technologic aids appear fraught with ambiguities, leaving interpretation wide open for court challenges. If terms like “actively participating,” “readily distinguishable,” “speed of play and depictions or graphics used in the game” are terms and phrases Congress will rely upon to clear up the distinction between class II and class III games, it remains unclear whether the proposed amendments will accomplish this goal. It is tragic that the NIGC would ignore Congressional policies of supporting tribal governments by allowing technologic advances in class II gaming and turn on tribes to pursue a policy that harkens back to the termination era. The proposed rules constitute a serious threat to a growing industry that has brought jobs, economic development, health care and higher standards of living throughout Indian country.

The proposed rules seek to require all games be inspected by an independent testing facility to determine if the games meet the requirements of the NIGC and provide written certification and report of this to the tribal gaming operations and the NIGC. If the proposed rules are intended to end confusion as to where class II ends and class III begins, why the need for an independent certification system? Nonetheless, the testing and certification requirements for class II games are entirely unnecessary, as it is fully within the sovereign right of the tribes, under the IGRA, to regulate class II gaming. *See* 25 U.S.C. § 2710 (b)(1). The proposed rules

essentially remove control of the regulation of class II gaming from tribal gaming commissions, shifting authority to the NIGC. The IGRA establishes a regulatory framework for tribal gaming regulatory agencies, pursuant to ordinances approved by the NIGC, to regulate class II gaming through a cooperative effort with the NIGC. Under the proposed rule changes, the NIGC will have the exclusive authority to regulate the testing and certification of electronic gaming devices by independent laboratories and, thus dictate which devices meet minimum NIGC standards to be classified as class II gaming. Of significant concern is the proposed compliance program set forth in 25 CFR § 546.10, which appears to give the NIGC free reign to commandeer tribal gaming authorities, usurping tribal sovereignty.

A number of states have refused to negotiate in good faith with tribes for class III compacts, and without a "*Seminole* fix," tribes are powerless to bring suit against states as Congress intended when it enacted the IGRA. Many tribes either cannot achieve meaningful negotiated compacts or are severely restricted in the number of games they can offer. While the well-documented success of tribal gaming enterprises in Connecticut and California pervade this country's collective misconception that all tribal gaming serves as a means to vast wealth and opportunity, the reality of the proposed amendments' impact would significantly affect the ability to generate appropriate funds that provide for basic needs on many reservations. If class II gaming is inappropriately (and irresponsibly) reformed, with merely a one-year grace period for those tribes affected by the changes, and no "grandfather clause" consideration, bankruptcy and further despair that accompanies such continued betrayal will certainly follow. It is equally important to note that the resulting economic disrepair will affect non-Indian communities as well. Because communities near tribal casinos tend to be underdeveloped and impoverished, those communities too stand to experience a significant socioeconomic decline.

Additionally, the proposed rules add yet another layer of governmental oversight to an already burdensome regulatory structure. The NIGC does not have the resources to implement the enforcement mechanisms for the proposed rules, and has admitted such, which ensures even greater delay and cost to the tribes. Currently, tribal governments, NIGC, FBI, BIA and Department of the Interior, U.S. Attorney, DOJ, Department of Treasury Financial Crimes Enforcement Network, IRS, Secret Service, state gaming commissions, and state and local law enforcement officers work to ensure there is compliance with the IGRA and other gaming regulations. Expanding the NIGC's powers will act to further complicate and burden the system already in place.

The proposed rules fail to comply with the NIGC's Policy Making Principles and Guidelines Part 6, which states "the NIGC will strive to grant tribes the maximum administrative and regulatory discretion possible in operating and regulating gaming operations on Indian land under the IGRA; and also strive to eliminate *unnecessary and redundant Federal regulations*, in order to conserve limited tribal resources, preserve the prerogatives and sovereign authority of tribes over their own internal affairs and promote strong tribal government and self-determination in accordance with Federal Indian policy and the goals of the IGRA." The proposed rules will upset the tribal-state compact process, and interfere with compacts that have already been agreed upon and implemented, which not only burdens class III gaming with the time and expense to remedy the changes, but blurs the line between class II and class III gaming, contrary to the stated intent of the proposed rules.

**THE NIGC LACKS LEGAL AUTHORITY TO ADOPT
THE PROPOSED AMENDMENTS.**

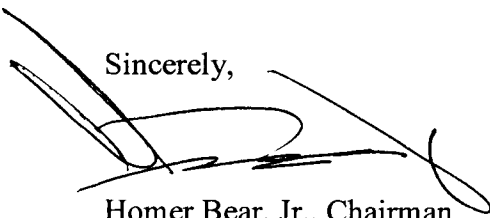
The general rulemaking authority of the NIGC, as set forth at 25 U.S.C. 2706(b)(10), is insufficient to permit it to issue the proposed regulations. That section states: "[T]he Commission . . . shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter." 25 U.S.C. § 2706(b)(10). While Congress apparently gave the NIGC a broad grant of authority to adopt regulations, the exercise of that authority is restricted to those regulations that "implement the provisions of [the IGRA]." No provision of the IGRA permits the NIGC to exclusively control the matters contemplated by the proposed amendments, however.

**THE PROPOSED REGULATIONS REPRESENT AN IMPERMISSIBLE
INTRUSION INTO TRIBAL SOVEREIGNTY BY THE FEDERAL GOVERNMENT.**

It appears that the federal executive branch has lost sight of well established policies of economic development and self-sufficiency in Indian country and instead seeks to attack tribal sovereignty. Unfortunately, the NIGC seeks to cast aside tribal sovereignty in its quest for newly found prosecutorial and regulatory powers. Congress intended that the IGRA permit tribes to embrace technologic advances and use class II technologic aids without state interference. If adopted, the proposed rules will destroy the economic prosperity of tribes engaging in class II gaming and subject such gaming to state control, revenue sharing and machine limits. Such a change in the law will have a devastating economic impact on tribes, especially those in states that rely on class II gaming to support their governmental operations and community services.

In closing, the Sac & Fox Tribe of the Mississippi in Iowa suggests the NIGC must listen in its consultations with tribal governments to develop an approach to gaming regulation that is consistent with both the existing structure of the IGRA and the President's Executive Memorandum on Government-to-Government Relationships with tribal governments. The proposed regulations are not.

Sincerely,

A handwritten signature in black ink, appearing to read "Homer Bear, Jr.", with a stylized flourish at the end.

Homer Bear, Jr., Chairman
Sac & Fox Tribe of the Mississippi in Iowa